

**Pages 1 - 37**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Jon S. Tigar, Judge

James Milstead, et al., )

)

Plaintiffs, )

)

VS. )

**NO. 4:21-CV-06338-JST**

)

General Motors, LLC, et al., )

)

Defendants. )

)

Oakland, California

Thursday, October 26, 2023

**TRANSCRIPT OF ZOOM PROCEEDINGS**

**APPEARANCES (VIA ZOOM) :**

For Plaintiffs:

BARON & BUDD, PC

Encino Plaza

15910 Ventura Boulevard, Suite 1600

Encino, California 91436

**BY: ROLAND TELLIS**

**ATTORNEY AT LAW**

SEEGER WEISS, LLP

55 Challenger Road, 6th Floor

Ridgefield Park, NJ 07660

**BY: STEVEN J. DAROCI, II**

**ATTORNEY AT LAW**

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

275 Battery Street, 30th Floor

San Francisco, CA 94111

**NIMISH R. DESAI**

**ATTORNEY AT LAW**

Reported Remotely By: Stephen W. Franklin, RMR, CRR, CPE  
United States Reporter

Stephen W. Franklin, RMR, CRR, CPE

United States Court Reporter

stephen\_franklin@cand.uscourts.gov (561)313-8439

**APPEARANCES (CONT'D) :**

For Plaintiffs:

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP  
250 Hudson Street  
New York, NY 10013

**BY: DAVID S. STELLINGS**  
**ATTORNEY AT LAW**

For Defendants:

KIRKLAND & ELLIS, LLP  
333 West Wolf Point Plaza  
Chicago, IL 60654

**BY: RENEE D. SMITH**  
**ATTORNEY AT LAW**

DYKEMA GOSSETT, LLP  
444 S. Flower Street, Suite 2200  
Los Angeles, CA 90071

**BY: DEREK S. WHITEFIELD**  
**ATTORNEY AT LAW**

## PROCEEDINGS

Thursday - October 26, 2023

2:06 p.m.

P R O C E E D I N G S

---o0o---

**THE COURTROOM DEPUTY:** Your Honor, now calling civil matter 21-6339, James Milstead v. General Motors, LLC, et al. If counsel could please state their appearances for the record starting with counsel for plaintiff.

**MR. TELLIS:** Good afternoon, Your Honor. It's Roland Tellis with Baron & Budd on behalf of plaintiffs.

**MR. STELLINGS:** Good afternoon, Your Honor. David Stellings, Lief Cabraser, also for the plaintiffs.

**MR. DESAI:** Good afternoon. Nimish Desai with Lief Cabraser for the plaintiffs.

**MR. DAROCI:** Good afternoon, Your Honor. Steven Daroci from Seeger Weiss on behalf of the plaintiffs.

**MS. SMITH:** And good afternoon, Your Honor. Renee Smith on behalf of General Motors.

**THE COURT:** Mr. Whitefield, your microphone is muted I think.

**MR. WHITEFIELD:** Sorry about that, Your Honor. I knew I'd do that. I'm Derek Whitefield. I represent General Motors, as well as Ms. Smith.

**THE COURT:** Some pandemic transitions are harder than others. We have administrative meetings every day in my chambers over Microsoft Teams. At least once a week I mute my

**PROCEEDINGS**

1 microphone by accident, so, but I'm learning.

2 Who will be arguing for the defendant today?

3 **MS. SMITH:** Your Honor, Renee Smith for General  
4 Motors. I will at least do the beginning of it, and I may have  
5 Mr. Whitefield interject sometimes if it's more appropriate for  
6 him, if that's acceptable.

7 **THE COURT:** That's fine.

8 Who will be arguing for the plaintiffs today?

9 **MR. TELLIS:** Your Honor, Roland Tellis will handle  
10 myself, will handle any defect-related issues, and Mr. Daroci  
11 will handle any Article III issues.

12 **THE COURT:** I'm sorry, you said Mr. Desai will handle  
13 any ...

14 **MR. TELLIS:** Mr. Daroci.

15 **THE COURT:** Okay. Mr. Daroci. Okay. Very good.

16 And Mr. Daroci, am I pronouncing your last name  
17 correctly?

18 **MR. DESAI:** Very impressive, Your Honor. Perfectly  
19 said.

20 **THE COURT:** I don't know that it rises to the level  
21 of impressive, but I'll take "sure" fine.

22 All right. I'm going to give counsel 25 minutes each  
23 to speak. I always say you don't need to take it all, and  
24 usually it's not a good idea, but everyone always does anyway.  
25 So we'll see what happens.

**PROCEEDINGS**

1 Even though it's the defendant's burden, I'm going to  
2 let each side have two bites at the apple. So the defendants  
3 will go first, so take as much time as they want as long as  
4 it's less than 25 minutes. Whatever time you haven't used you  
5 can devote to a rebuttal argument, and then the same thing will  
6 be true for the plaintiffs.

7 And even though Ms. Lee will be keeping time, I also  
8 like to do that.

9 Ms. Smith, you have the floor.

10 **MS. SMITH:** Thank you, Your Honor. It's nice to have  
11 the opportunity to see the Court and our friends on the other  
12 side on this case. It's been a little bit.

13 And from the first-amended complaint in this case,  
14 which was filed October 26, 2021, so exactly two years ago  
15 today, plaintiffs have lodged a straightforward specific theory  
16 of a defect. Not a plausible theory at least as to their  
17 vehicles, as we have argued before, but a specific one, which  
18 was a categorical defect where there was a shutoff timer, 45  
19 seconds, milliseconds into a crash, that prevented airbags from  
20 deploying after that time. We don't agree that that's  
21 necessarily a defect -- we understand Your Honor came to a  
22 different conclusion -- but it was a very specific allegation.

23 Now, two years later, plaintiffs have gone from a  
24 specific, albeit implausible defect at least as to their  
25 vehicle, to a new defect definition or theory that is neither

**PROCEEDINGS**

1 plausible or meaningful. It's meaningless. It's inconsistent  
2 with what they need to plead for a defect, it's inconsistent  
3 with what is needed to be pled for knowledge, and it's  
4 inconsistent with Article III standing.

5 I looked back at our first -- our hearing on that  
6 first-amended complaint, and one of the questions Your Honor  
7 asked was how much do plaintiffs have to say about this alleged  
8 defect to plausibly plead their personal vehicles have it, and  
9 you stated it's not sufficient to simply march into federal  
10 court and say there is a software defect in these millions of  
11 vehicles, and we should get discovery to learn more about it.  
12 And we of course agree with that.

13 **THE COURT:** Ms. Smith, this is not something I said  
14 in a written order.

15 **MS. SMITH:** Correct.

16 **THE COURT:** This is a comment I made on the bench; is  
17 that true?

18 **MS. SMITH:** Correct, Your Honor. Yes, yes.

19 And one of the things Your Honor asked the parties is  
20 are there some guideposts or guidelines that would apply to all  
21 cases and what needs to be pled. And I think in fairness,  
22 neither we nor plaintiffs I think gave you exact guideposts,  
23 but I was trying to look at those guideposts to frame the  
24 argument in this case. And while there's probably no checklist  
25 for each case, in this case in particular, plaintiffs must, but

**PROCEEDINGS**

1 do not, quote, sufficiently define a defect. They must, but do  
2 not, sufficiently allege that GM had knowledge of this defect  
3 as they allege it, knew it was a defect, a safety defect,  
4 before they purchased their vehicles. And because this is a  
5 overpayment theory, this is not a personal injury case, they  
6 must allege facts sufficient to show that they have standing.  
7 And sometimes plaintiffs correctly note sometimes it's referred  
8 to in terms of Article III standing, sometimes it's referred to  
9 as 12(b)(6), but something more than a feature that was not  
10 part of the benefit of the bargain to begin with.

11           So I want to start with the defect is not defined.  
12 Plaintiffs' opposition to our brief, to our motion to dismiss  
13 this brief takes -- vehemently opposes the idea that they did  
14 not allege a specific number in this brief, and they -- and we  
15 argued in our opening motion that it's -- there's different  
16 phrases, it's premature, it's too soon, et cetera. And  
17 plaintiffs in their opposition said, to be clear, we are saying  
18 the defect is anything less than a hundred milliseconds.  
19 Again, I don't agree that that is actually necessarily how  
20 their complaint reads, but for the sake of this argument let's  
21 say that's what the defect is.

22           But by their own allegations, plaintiffs do not plead  
23 enough to make that a meaningful number. Plaintiffs throughout  
24 their complaint and their motion to dismiss state timing is  
25 critically important to this case. And it is critically

## PROCEEDINGS

1 important to this case.

2 Plaintiffs also throughout their complaint, ECF  
3 number 197, and throughout their opposition to the motion to  
4 dismiss, and throughout all the complaints and motions to  
5 dismiss that have come before it, plaintiffs again and again  
6 and again allege that what matters is what happens in a  
7 real-world crash. We agree with that. The problem with this  
8 complaint as it is alleged is we do not know what plaintiffs  
9 are alleging occurs in a real-world crash. We know plaintiffs  
10 are alleging there is a cutoff of some kind of a hundred  
11 milliseconds, but plaintiffs candidly plead that that is not  
12 linear or real time. So it's not from the first instance until  
13 a hundred milliseconds from that. Instead, it's counted by  
14 software time. And I certainly do not purport to understand  
15 how it works, but in general it's not linear. It's -- it can  
16 go backward, forward, and it's because of unique mechanics that  
17 I don't understand, and Mr. Whitefield will be able to address  
18 any questions better than I on this.

19 But regardless --

20 **THE COURT:** If you can go backward you should make a  
21 movie of it, because everyone would be very rich. I don't  
22 think that -- I don't think that the -- anyway, but I take your  
23 point.

24 **MS. SMITH:** No, no. And if I miss anything,  
25 Mr. Whitefield, please tell me.



**PROCEEDINGS**

1 But my -- the way we -- we were trying to figure out  
2 how to show it, and the closest I could think of is, because I  
3 watch quite a bit of TV, is you're watching a 30-minute show,  
4 but you missed a part, you know. So you rewind back, and a  
5 show that took really 30 minutes took 40 minutes or 50 minutes.

6 **THE COURT:** Yeah.

7 **MS. SMITH:** And so something like that.

8 So at the end of the day, because there's all sorts  
9 of reasons that adjusts, in a real accident, in a hundred-  
10 millisecond cutoff by software time may be 120 in real time.  
11 It may be 140. It may be 180. We don't know, and it is not  
12 alleged what that means in real time.

13 **THE COURT:** And when you say it may be, do you mean  
14 the time between the beginning of the accident, however that's  
15 defined, and the deployment of this system could be 180  
16 milliseconds, or do you mean something else?

17 **MS. SMITH:** I'm going to ask Mr. Whitefield to, just  
18 because I don't want to misstate it, which I'm worried I'm  
19 about to do.

20 **MR. WHITEFIELD:** So, Your Honor, the way that the  
21 software evolved over time, starting back in 1999 they had what  
22 was characterized back then as a 45-millisecond cutoff for the  
23 Algo S algorithm with the calibration that was used at that  
24 time. So you have both an algorithm in 1999, and you have a  
25 calibration with what was alleged to be a cutoff.

## PROCEEDINGS

1 As the development of the GM algorithms continued --  
2 and we can see this in Mr. Caruso's McCoy expert report, which  
3 is in the docket at 197-4, but the software evolved, and the --  
4 GM adopted what was called "event progression timers." EP1 was  
5 the way they -- the short version of it. And initially the way  
6 EP1 worked is if you started a crash, let's say you had a curb,  
7 a concatenated event, and then that impact was over but you  
8 went into a tree, EP1 would count backwards while the crash was  
9 no longer happening until the system completely reset or there  
10 was something else that happened during the crash.

11 **THE COURT:** Okay. Let me stop you there, because I  
12 don't want to derail the argument entirely. I think the  
13 sentences of what you said explains what Ms. Smith said a  
14 moment ago.

15 **MS. SMITH:** Thank you. And thank you,  
16 Mr. Whitefield. Thank you, Your Honor, for indulging me.

17 And so I think -- and I'll wrap up this portion of  
18 it, but as a threshold issue we don't know, even if there is a  
19 100-millisecond cutoff, we don't know what that means in a  
20 real-world accident. And that matters here, because the whole  
21 case is about whether the cutoff is too soon to prevent an  
22 airbag from happening in a real-world accident, and plaintiffs  
23 just don't allege that is the case here. And I -- throughout  
24 this case from the beginning, one thing that we've all talked  
25 about is of course these are incredibly complex issues, complex

## PROCEEDINGS

1 software, and there is an issue of, well, how much could  
2 plaintiffs allege if they don't have access to whatever went  
3 into the code or for other documents, and that's true, but in  
4 cases when we're looking at whether you can unlock the doors of  
5 discovery, especially here, where plaintiffs are seeking to  
6 unlock the doors of discovery from 20 years-worth of vehicles,  
7 every single one, every single truck and SUV, is generally  
8 there's something amiss to begin with.

9           So, for example, the Court found that plaintiffs had  
10 plausibly pled that a 45-millisecond cutoff sufficiently pled a  
11 defect, although not in plaintiffs' own vehicles. And in that  
12 case, plaintiffs alleged at that time several incidents where  
13 the root cause was attributed to a 45-millisecond cutoff. They  
14 alleged their expert, Mr. Caruso's recollection that he had  
15 rallied against a 45-millisecond cutoff and he later served as  
16 an expert.

17           There is nothing, nothing alleged, especially nothing  
18 alleged before plaintiffs purchased their vehicles, to suggest  
19 that this new cutoff, that there's anything wrong with it.  
20 There's nothing to suggest that plaintiffs' vehicles, 2010 and  
21 2012 model year vehicles, there's nothing to suggest that those  
22 vehicles are having some big issue where airbags are not  
23 deploying where they should, or that in certain -- or that  
24 they're concatenated events, not to point and compare where the  
25 vehicles are. There's just not that first step, even, in this

## PROCEEDINGS

1 case to say there's something wrong, regardless of whether  
2 there could be for that initial 45. This new defect, there's  
3 nothing there.

4 And one of the things that plaintiffs allege is --  
5 excuse me, in their response to the motion to dismiss,  
6 plaintiffs allege that it doesn't matter if a consumer would  
7 care about, you know, a hundred milliseconds, versus 40  
8 milliseconds, versus 45, and that may be true. Plaintiffs  
9 state in their motion to dismiss that what matters is that GM  
10 should have disclosed the practical effects of the defect to  
11 the consumers, and that ECF 202, at page 21. But plaintiffs do  
12 not allege what the practical effects are in real time. We  
13 don't know what the effects are as alleged, and there's nothing  
14 to suggest there is a problem here.

15 The other issue that is affected by the revised  
16 definition is the knowledge issue. Again, the Court could have  
17 found that GM could have been aware that people thought 45  
18 milliseconds was a defect. There's nothing suggesting or  
19 sufficiently pleading that GM believed or should have believed  
20 that this new undefined cutoff was a defect. Again, there's  
21 nothing amiss. There's no allegation that back in 1999 someone  
22 said everything under a hundred is defective. And one thing --  
23 and nor is there anything that plaintiffs allege about what  
24 happened after that. Plaintiffs compare. They say the auto  
25 group or the car group used a longer cutoff, a hundred to 150

## PROCEEDINGS

1 milliseconds. Even if you take that as true, there's not  
2 allegations that somebody said anything under that is  
3 defective. All the allegations were about 45.

4 And probably more importantly is the comparison of  
5 automobiles to here is based strictly in 1999. There's no  
6 allegation about what GM cars use after that date, aside from  
7 there's some just generic information and belief the cars used  
8 longer cutoffs in GM and other vehicles, which is not specific  
9 enough.

10 **MR. WHITEFIELD:** May I add to that point, Ms. Smith?

11 Just briefly, Your Honor, plaintiffs in the third-  
12 amended complaint at Footnotes 6, 13, 16, 17 and 24 cite to a  
13 book by Chan called Fundamentals of Crash Sensing in Automotive  
14 Airbag Systems. At page 26 of that book it says, quote: A  
15 vehicle with a stiff front-end structure, such as a heavy-duty  
16 pickup truck, will generate a signal different from that of a  
17 passenger car colliding with the same obstacle at the same  
18 speed.

19 **THE COURT:** Is that in the record?

20 **MR. WHITEFIELD:** It is not in the record other than  
21 by way of the references to this book in the footnotes of --

22 **THE COURT:** I mean, I understand that. I get that,  
23 but -- and someone challenging a complaint can ask the Court to  
24 incorporate by reference or take judicial notice of matters --  
25 of other parts of matters that have been discussed in the

## PROCEEDINGS

1 complaint.

2 So my question -- but my question -- but the thing  
3 you just said, that didn't happen before this hearing.

4 **MR. WHITEFIELD:** It has not, Your Honor, and I'd ask  
5 for permission to do that at this late date, because I didn't  
6 find this until just in preparation for this hearing.

7 **THE COURT:** Your opponents are entitled to more  
8 notice than that. I'm going to deny that request.

9 **MR. WHITEFIELD:** My only point, Your Honor, was just  
10 that --

11 **MS. SMITH:** I'm sorry.

12 **MR. WHITEFIELD:** -- Ms. Smith was making the point  
13 that the plaintiffs say that passenger car times should be  
14 relevant here, and cars and trucks are different.

15 **THE COURT:** The Court's ruling had nothing to do with  
16 the merits.

17 **MR. WHITEFIELD:** Understood.

18 **THE COURT:** Ms. Smith.

19 **MS. SMITH:** All right. And, Your Honor, just to --  
20 continuing on the knowledge point is one case that plaintiffs  
21 cite in their motion to dismiss opposition is the *Deras v.*  
22 *Volkswagen* case. Which, I hope I'm pronouncing *Deras*  
23 correctly. And we had originally cited that case for the  
24 proposition that just because you have a number of reported  
25 events doesn't necessarily plausibly allege that a defendant

## PROCEEDINGS

1 had sufficient knowledge. And plaintiffs came back in the  
2 motion to dismiss and said -- excuse me, in their opposition to  
3 a motion to dismiss it said, notably, in a later opinion  
4 regarding these revised allegations, the Court concluded that  
5 while, standing alone, the allegations regarding the complaints  
6 were insufficient to allege knowledge, taken as a whole and  
7 viewed in a light most favorable to plaintiffs, together with  
8 the broader record in that case, the allegations regarding  
9 knowledge were sufficient. And that's the *Deras* case with the  
10 cite 2019 Westlaw 935130, cited in plaintiffs' opposition, ECF  
11 202.

12 And that case actually I think really makes the point  
13 here. In that case, the Court did find there was sufficient  
14 knowledge on the amended complaint, but it said simply even  
15 alleging that the NHTSA complaints were too high in number,  
16 without more it was not sufficient, instead, there were  
17 allegations about NHTSA investigations, there were allegations  
18 about governmental actions, there were allegations about  
19 reports. And also that case, as I'm sure Your Honor knows  
20 better than I, involved sunroofs shattering. Which, unlike  
21 airbags not deploying, which happens, and appropriately happens  
22 and is expected to happen and was disclosed in GM's owner's  
23 manuals, arguably it is not expected that sunroofs would  
24 shatter.

25 So we would just say that the *Deras* opinion I think

## PROCEEDINGS

1 is very on point for why they are not sufficient.

2 And then finally, because I want to either reserve  
3 time or prove that I won't use all the time, is on the standing  
4 issue we cite the *Johnson versus FCA* case in our brief  
5 repeatedly, and we do think it is exactly on point here. But  
6 we realize that we are also in the Ninth Circuit, and so one  
7 case that I would request perhaps if the Court would indulge  
8 and re-look at is *Anderson versus Hyundai Motor Company*, and  
9 that cite is 2014 Westlaw 12579305, and I think that is also  
10 precisely on point for us in this case.

11 So with that, unless the Court has questions now, I  
12 would respectfully reserve the rest of the time.

13 **THE COURT:** Thanks, Ms. Smith. You have about five  
14 and a half minutes remaining.

15 Mr. Tellis?

16 **MR. TELLIS:** Thank you, Your Honor.

17 While we're up against zealous advocates, the idea  
18 that our complaint contains, quote, nothing to support a  
19 plausible defect I think is disingenuous. I will walk you  
20 through the nothingness, Your Honor, in a moment here. But  
21 before I do, I just wanted to start with the guidance Your  
22 Honor gave us in the last order you issued on GM's motion to  
23 dismiss.

24 Your Honor was clearly troubled that the definition  
25 we proposed at that time of a 45-millisecond cutoff was not



## PROCEEDINGS

1 uniform, because while you accepted it as implemented in 1999,  
2 you noted that there were instances in the class period where  
3 the cutoffs were deemed to have been 16 milliseconds, 50  
4 milliseconds, et cetera, and therefore that 45-millisecond  
5 cutoff that we had started with was not uniform across the  
6 board. But in granting us leave to amend, you very clearly  
7 noted, quote, it may be, as plaintiffs' opposition suggests,  
8 that any cutoff time below a certain threshold would constitute  
9 a design defect, end quote. And so with that guidance and the  
10 benefit of a leading automotive expert, we filed a third-  
11 amended complaint that very clearly alleges that GM's use of a  
12 cutoff below 100 milliseconds in the class vehicles constitutes  
13 a design defect. Anything less than that hundred millisecond  
14 cutoff creates a dead zone during which the airbags are  
15 foreseeably necessary, but they don't deploy. It's well  
16 defined --

17 **THE COURT:** Mr. Tellis, I'm going to use Ms. Smith's  
18 argument as an opportunity to frame your response a little bit.  
19 I'll just tell you the things that she talked about that I'm  
20 hoping you'll address, not immediately, but at some point  
21 during your remarks to the Court.

22 Her argument that there is nothing in the complaint  
23 to suggest that there's something wrong with the -- with a  
24 cutoff of below a hundred milliseconds, in other words, that  
25 there's nothing in the complaint that shows that that defect,

## PROCEEDINGS

1 if there be one, manifests in the real world in any way that  
2 actually harms consumers. That's what I understand that point  
3 to be. And then her point that what everyone might think about  
4 the allegations about corporate knowledge, all of them deal  
5 with a cutoff of below 45 milliseconds, and there aren't  
6 corporate knowledge allegations in the complaint regarding a  
7 cutoff of below a hundred milliseconds.

8 Those are the things I hope you'll get to.

9 **MR. TELLIS:** I will, Your Honor.

10 Let me just go ahead and start with the first one,  
11 which is this idea that there's nothing harmful or we haven't  
12 alleged, you know, this hundred-millisecond is somewhat  
13 arbitrary or speculative. Clearly not. It's plausible because  
14 there is a factual basis that will allow this Court to  
15 reasonably infer that a cutoff of less than a hundred  
16 milliseconds is actionable. Let's walk through those.

17 So we start at paragraphs 4 through 6 where we allege  
18 that GM software engineer, Delco Engineering and its manager,  
19 Chris Caruso, warned GM about its decision to implement a  
20 premature cutoff during crash events of 45 milliseconds, which  
21 was reckless and dangerous. In fact, they insisted that if GM  
22 go forward on this path, they give them a release. We allege  
23 that the truck groups ignore Delco, but the car group did not.  
24 The car group, in fact, heeded the warning and established a  
25 much longer hundred-millisecond cutoff. So this is evidence

## PROCEEDINGS

1 that inside GM there was a disagreement, the cars repeated the  
2 advice that were being given by the software engineer and set  
3 the cutoff at a hundred milliseconds.

4 We allege that anything less -- this is in  
5 paragraph 42 -- anything less than a hundred milliseconds is  
6 dangerous, because a typical crash duration for a straight-  
7 forward frontal collision lasts approximately 80 to 150  
8 milliseconds, roughly twice as long as what the trucks group  
9 adopted. We allege at paragraph 64 that other industries,  
10 other manufacturers in the industry use a longer window than GM  
11 does, almost twice as long as their 45-millisecond cutoff.

12 And so the trucks group deliberately chose a  
13 reckless, premature 45-millisecond cutoff, or let's just say a  
14 cutoff less than a hundred milliseconds, which was contrary to  
15 their internal advice, there cars groups' actions and industry  
16 standards. I would say the Ninth Circuit hasn't really  
17 articulated what one needs to allege to properly allege a  
18 defect, but I would suggest that those three data points, what  
19 they were getting from their own engineers, what their own cars  
20 groups did and what the industry does is sufficient to make the  
21 hundred-millisecond cutoff a plausible benchmark.

22 Now, what about the data points that show that  
23 that -- that GM was employing less than a hundred-millisecond  
24 cutoff throughout the class period? That's the issue that  
25 troubled your Court, Your Honor the first time around. And we

## PROCEEDINGS

1 have several allegations that walk you through the entire  
2 18-year period, and I think when read in the light most  
3 favorable to the plaintiffs, allow you to draw an inference  
4 that that -- that GM was employing a defective and aggressive  
5 cutoff for the entire period.

6 We start with Chris Caruso's testimony, where he was  
7 at GM and Delco for a six-, seven-year period, 1999 through  
8 '06, where he recognized and observed the use of this defective  
9 calibration, including when later model years were already in  
10 development. In other words, he's there in 2006. The 2007 and  
11 2008 model year vehicles are already in production.

12 In paragraph 68, we talk about how GM had a practice  
13 of setting its calibration on a group-wide basis within the  
14 truck group. In other words, all trucks got the same  
15 calibration on the -- the aggressive calibration. It wasn't  
16 that each truck had some examination as to what we should set.

17 We then look at the most recent example of an  
18 accident, which was in 2018. This is detailed through  
19 paragraphs 102 through 108 in the case. This is the McCoy  
20 lawsuit, where Mr. Caruso actually examined the software file  
21 of that subject vehicle, which was a class vehicle, a 2018  
22 Denali, and described seeing cutoffs that were well below the  
23 hundred-millisecond threshold. He found it was defective in an  
24 '18 vehicle, and it was a result of a carryover from the Algo  
25 software that he had designed years earlier when he was at GM.

## PROCEEDINGS

1 So Mr. Caruso observes that the deficient and defective cutoff,  
2 the aggressive cutoff of less than a hundred milliseconds, was  
3 still being used 19 years after he first warned GM about it.

4 Your Honor found that that allegation, the Caruso-  
5 reported inventory, quote, supported an inference that the  
6 defect similar to the one in 1999 was installed in all the  
7 class vehicles because his report concludes that the trucks  
8 group was still doing it. And then there are a few other data  
9 points between the 2018 and the earlier one. There's 2005, the  
10 Motstra (phonetic) lawsuit. Again, Caruso describes the 45- to  
11 50-millisecond cutoff. There was a 2006 letter that was  
12 written by another automotive expert to GM, Sal Fiorello, who  
13 describes the flawed deployment thresholds in a 2006 class  
14 vehicle.

15 There's the *Greenwood* lawsuit, which has all the  
16 hallmarks of a calibration defect in a 2006 vehicle.

17 (Reporter clarification.)

18 **MR. TELLIS:** I apologize.

19 Greenwood is in paragraph 122. That involves a model  
20 year 2006 vehicle. We then move to paragraphs 123 through 124,  
21 which we talk about a model year 2009 vehicle in the *Woods*  
22 lawsuit. We then go to paragraphs 115 and 116 which talk about  
23 a 2014 vehicle in the *Vaith* lawsuit. We also have allegations  
24 about GM's continued use of Delco hardware through 2018,  
25 including in the McCoy vehicle.

## PROCEEDINGS

1 And so all these sources together, Caruso's testimony  
2 at the very beginning and at the very end and all these data  
3 points in between, Your Honor, and the group-wide manner in  
4 which GM sets its calibration for each vehicle group strongly  
5 support the inference in plaintiffs' favor that GM continued to  
6 use a defective approach to its calibration software throughout  
7 the class period. And of course the class reps all fall right  
8 between those; we've got 2010 to 2012.

9 Now, let me talk about GM's knowledge of the defect  
10 or what they knew and when, which was I think the other issue  
11 that was raised.

12 First, Your Honor, we know that they intentionally  
13 chose this path at the outset. We know that from Chris  
14 Caruso's testimony, that he warned them against it, they  
15 ignored him and they implemented it. That's paragraphs 63 to  
16 66.

17 We also know that they've gotten notice from the  
18 various crashes that I just went through that the aggressive  
19 cutoff that they were employing was causing accidents and  
20 incidents. That is to say, whether they knew that the 16  
21 milliseconds or 45 milliseconds or 50 milliseconds, what they  
22 knew was the approach they had at the time, which was to set an  
23 aggressive cutoff that was less than a hundred milliseconds,  
24 contrary to what the cars group was doing, was a problem.

25 And then we cite to the more than 800 complaints to

## PROCEEDINGS

1 NHTSA beginning in 1999 and continuing through, by folks who  
2 owned class vehicles who would experience frontal crashes with  
3 airbags and seatbelt failures. GM is deemed to have reviewed  
4 those under its statutory written obligations. We cite that in  
5 paragraph 128. In fact, dozens of those descriptions actually  
6 say they notified GM of the issue.

7 They describe the symptoms of the calibration  
8 problem. They describe the fact that their airbags and  
9 seatbelts failed. And we're dealing with a defendant here who  
10 has superior knowledge over class members, over plaintiffs'  
11 counsel. The idea that they weren't told what the exact  
12 calibration setting was in these vehicles is besides the point.  
13 What they know is that the strategy that they implemented in  
14 1999 and which clearly now continued through 2018 was flawed  
15 Lauderdale, and we think, Your Honor, that with those  
16 allegations in mind, we're entitled to the inference that they  
17 were on notice of this defect.

18 Mr. Daroci can take up Article III if you'd like, or  
19 if you have questions for me I'm happy to answer them.

20 **THE COURT:** I don't have any questions. Thanks.

21 **MR. DAROCI:** Thank you, Your Honor. I'll just  
22 address, then, this reference to *Johnson* and later on in  
23 *Anderson*.

24 In its most recent motion, just as in its reply brief  
25 for its prior motion, GM really relied on this Beecham case, a

## PROCEEDINGS

1 Michigan case, *Johnson versus FCA* --

2 (Reporter clarification.)

3 **THE COURT:** All right. I'm going to stop the clock  
4 for a second so Mr. Daroci can make an attempt to change his  
5 microphone.

6 Mr. Daroci, I should also tell you, I'm not sure I  
7 see your Article III standing problem here. I think this is  
8 a -- I think this is just a 12(b)(6) motion, and the question  
9 of whether the plaintiffs have adequately pled the elements of  
10 their claims, that's what's in front of the Court. I don't see  
11 a separate standing issue. I mean, either -- obviously if they  
12 didn't plead a claim, they don't have an injury, so, and they  
13 can't be in court. But I don't think that's necessarily an  
14 Article III problem.

15 **MR. DAROCI:** I think that's right, Your Honor.

16 I mean, it's framed now in the third-amended  
17 complaint as a standing issue, but it's really the same  
18 argument that's been made twice over now about plaintiffs  
19 attempting to plead, you know, a no-injury product liability  
20 action and making a claim out of a non-bargained-for safety  
21 feature. That argument's been made twice over now. The  
22 Court's we think properly rejected it both times.

23 And the line of cases, *Birdsong*, *Lassen*, *DuSolet*  
24 (phonetic), I don't need to go through them in detail, but I  
25 think it suffices to say that in all of those cases that the



## PROCEEDINGS

1 Court finds there was a defect, in all of those cases it was  
2 plaintiffs arguing for hypothetical non-bargained-for safety  
3 features, and that's not really what we have here. Not only  
4 that, in all those cases the alleged defect arose out of misuse  
5 or user error. Whereas here, by contrast, the SDM defect is  
6 present in the vehicle regardless of how those vehicles are  
7 being operated.

8 So I'll just take a second to discuss *Johnson* and I  
9 guess *Anderson*, as well, given GM's emphasis on that case in  
10 its most recent motion. While there is some surface level  
11 similarities between that case and this one, there are material  
12 differences between the cases that we think negates any of  
13 *Johnson's* potential persuasive value here, and we think the  
14 Court was spot on in its last order pointing out what those  
15 differences were and rejecting GM's attempt to analogize the  
16 cases.

17 In the Court's last order, Your Honor noted that in  
18 *Johnson*, the district court in Michigan concluded that the  
19 plaintiffs' own allegations show that Chrysler in that case did  
20 not mislead the plaintiffs. Whereas here, the Court's already  
21 found that the plaintiffs have provided sufficient allegation  
22 to conclude that GM did mislead the plaintiffs. That includes,  
23 for example, the omission claim that Your Honor has already --

24 **THE COURT:** That observation is I would say made in  
25 passing because it's not in a court order, but it's in a

## PROCEEDINGS

1 footnote. So I already know about that. If there are other  
2 ways of distinguishing Johnson, that's what I would like to  
3 hear from you.

4 **MR. DESAI:** Sure, Your Honor.

5 In that case, and it goes -- it's related to the, you  
6 know, the issue of whether the defendant there mislead the  
7 plaintiffs. But in that case none of the representations made  
8 in the brochures or consumer-facing statements by Chrysler said  
9 any -- you know, they were consistently -- they were much more  
10 transparent than GM here where they said, yeah, the side impact  
11 airbags are not going to deploy in all rollover crashes.  
12 They'll only deploy as and if necessary. But, you know, here  
13 GM never told consumers that airbags with fail even in the most  
14 severe accidents. So GM's misleading conduct here includes,  
15 first, as I mentioned, the omission that this Court's already  
16 upheld, as well as the exemplar ads and brochures we point to  
17 that fail to mention the SDM defect or the practical effects of  
18 that defect whereby the safety system in GM trucks will not  
19 activate seatbelts and airbags in a variety of severe frontal  
20 crashes.

21 **THE COURT:** Just as I did with Mr. Tellis, in just a  
22 minute whenever that happens, I'm going to say to Ms. Smith,  
23 here are the things that Mr. Tellis and Mr. Daroci told me I  
24 want you to respond to, and one of the things I'm going to say  
25 to her is: What about the question of what GM told consumers

## PROCEEDINGS

1 about these airbags -- I mean, about this SDM system, because I  
2 actually don't remember that and what that is in the complaint,  
3 and it's faster for me to ask one of you than to go find it  
4 myself. So she's going to have an opportunity to talk about  
5 that. Do you want to anticipate her argument on that point?  
6 What is she gonna say GM said to its customers about SDM?

7 **MR. DAROCI:** Your Honor, I think what Ms. Smith might  
8 say is that they never made any sort of statement that the  
9 airbags were going to deploy in all crashes. That's what they  
10 say in their motion to dismiss. And we think that's, you know,  
11 a strawman. Of course there's no bargain here that we're going  
12 to purchase cars where the airbags deploy in all accidents.  
13 What they said here consistently in their literature was that  
14 they will deploy in moderate to severe frontal crashes. And  
15 again, we point out in our complaint, you know, numerous  
16 brochures and consumer-facing statements where that's the case.

17 So plaintiffs expected --

18 **THE COURT:** I think you've addressed that point.

19 **MR. DAROCI:** And then lastly, Your Honor, quickly on  
20 *Anderson*, which Ms. Smith raised at the end of the argument,  
21 that's a unique case that we think has no persuasive value  
22 given some of the unique factual circumstances of that case.  
23 That case dealt with side impact sensors and the location of  
24 those sensors on Hyundai vehicles. The plaintiffs argued that  
25 the side impact sensor should be located on the B pillar of a

**PROCEEDINGS**

1 vehicle rather than a cross member in line with the rest of  
2 Hyundai vehicles. And in assessing standing in that case, the  
3 Court noted that plaintiffs' position regarding the placement  
4 of the sensor was based solely on two studies that Hyundai  
5 itself had conducted. The Court considered those reports and  
6 found that not only did they not support plaintiffs'  
7 allegation, they really directly contradicted what plaintiffs  
8 were saying. So there, the Court found it didn't need to rely  
9 on plaintiffs' pleadings when there was contrary evidence in  
10 the record and for that reason found that plaintiffs had not  
11 adequately demonstrated that there was any defect in the  
12 vehicles.

13 So this is a unique factual circumstance not present  
14 in this case that we think, again, negates any persuasive value  
15 that that case might have.

16 **THE COURT:** All right. I stopped and started  
17 Mr. Daroci's time because it was a microphone issue. I was a  
18 little slow to restart it. I think you're about where  
19 Ms. Smith was. I think your side has about five and a half  
20 minutes left, actually.

21 **THE COURTROOM DEPUTY:** Yes, sir. That's correct.

22 **THE COURT:** Is that right?

23 **THE COURTROOM DEPUTY:** Yes.

24 **THE COURT:** There we go. Ms. Lee knows. I should  
25 have just asked her.

## PROCEEDINGS

1 Ms. Smith, rebuttal argument.

2 **MS. SMITH:** Thank you, Your Honor.

3 Let me just start on the *Anderson* issue. In  
4 answering Your Honor's questions, it's not only that GM did not  
5 say the airbags would deploy in all accidents. GM disclosed  
6 that they would not. GM disclosed -- and this is at, for  
7 example, in our opening motion, ECF 201, at pages 4 through 5,  
8 just some examples, and these are owners' manuals that are  
9 quoted and reproduced in our complaint. They are in the  
10 record.

11 Among other things, the manuals advise whether the  
12 frontal airbags will deploy or should deploy is not based on  
13 how fast your airbag is travel -- excuse me, your vehicle is  
14 traveling, but depends largely on what you hit, the direction  
15 of impact and how quickly your vehicle slows. Plaintiffs  
16 allege in their complaint -- and this is in the third-amended  
17 complaint, paragraph 30, the airbags are not meant to deploy  
18 with every impact. That is disclosed, it is what plaintiffs  
19 allege, and it's correct.

20 *And Anderson*, I just want to go back briefly to  
21 *Anderson*, which is the -- almost the exact same language was at  
22 issue in *Anderson*, where they said, disclosed: Side airbags  
23 are designed to inflate in moderate to severe side collisions.  
24 That's almost exactly what GM said, in moderate to severe  
25 frontal collisions. It's almost the exact same.

## PROCEEDINGS

1 And *Anderson* -- also just one more point on *Anderson*,  
2 which is plaintiffs say all of these cases involve misuse.  
3 Anderson is just like this case. Anderson is just like this  
4 case in where it's when the airbag should go off in an accident  
5 and looking back and saying, should there be different things  
6 that go into it. So I'll move on from standing, because I --  
7 we hear Your Honor on that position, and I want to respond  
8 briefly to what Mr. Tellis said.

9 What Mr. Tellis went through and said here's all the  
10 bases of GM's knowledge, literally almost every single one of  
11 them either didn't have anything about a time cutoff or went  
12 back to the 45-millisecond cutoff. There is nothing that  
13 Mr. Tellis referenced that refers to a hundred-millisecond  
14 cutoff aside from the following:

15 One, he refers to automobile, the automobiles using a  
16 different cutoff. Here is the sum and substance of what  
17 plaintiffs allege about that in the complaint:

18 First of all, they allege in 1999 that GM cars used a  
19 different cutoff. They don't allege anything else since 1999  
20 about the GM cars aside from this. This is paragraph 64 of the  
21 complaint. GM's own cars group, and on information and belief,  
22 other major vehicle manufacturers throughout the industry  
23 include a significantly longer window for the SDM to detect a  
24 potential accident and deploy the airbags and seatbelts.  
25 That's it. There's no --

## PROCEEDINGS

1           **THE COURT:** Aren't there a series of allegations  
2 beginning at approximately paragraph 4 and continuing past  
3 paragraph 6, even though that's where Mr. Tellis stopped, that  
4 have as their theme that once this 100-millisecond cutoff had  
5 been established as a more safe recommendation by one part of  
6 the company, that basically the company was thereafter on  
7 notice of that cutoff -- and I'm not doing a good job of  
8 summarizing the allegations, but my recollection is that the  
9 phrase "a hundred-millisecond cutoff" appears more than once in  
10 that section in reference to this question.

11                   Am I wrong?

12           **MS. SMITH:** No, you are not wrong. The phrase "a  
13 hundred milliseconds" is used in terms of saying the car group  
14 used a longer cutoff in 1999. And in this version of the  
15 complaint they say a hundred milliseconds, in the old version  
16 they said 150, but that's it. There's nothing else aside from  
17 the car group in one year used a different cutoff. There's no  
18 allegation that they did in 2010. There's no allegation it  
19 stayed the same.

20           **THE COURT:** But let me ask you a question, though.

21                   I mean, let's say, let's say -- and as always, if  
22 you're playing devil's advocate, please. I may have  
23 communicated earlier how I feel about having my off-the-cuff  
24 comments quoted back to me at a hearing, but anyway, let's say  
25 there's a children's toy, and it's an old-fashioned toy, the

## PROCEEDINGS

1 one where you pull the lid off and then fake snakes come  
2 springing out, and -- but in this particular manufacturer in  
3 the hypothetical decides it would be much more fun if you use  
4 real snakes. So they put that out on the market, and people  
5 open the lid and actual venomous snakes come shooting out of  
6 the toy.

7 And a report is written inside the company and says,  
8 you know, that's really not a good idea. The venomous snakes  
9 have bitten several children, and many of them have needed to  
10 be hospitalized as a result of that, so we should not do that  
11 anymore. And the report is written in 1999. All right? And  
12 the facts don't change. There's never another report, and  
13 nonetheless, the company keeps putting lives snakes in just  
14 because they like the publicity and it's actually very  
15 profitable. There's a high markup, because no one else has a  
16 product like that. So they keep doing it.

17 And then at oral argument in 2023 someone says, Your  
18 Honor, here's the thing, nothing changed from 1999 other than  
19 this one little memo. I don't know what the question is.  
20 That's the hypothetical.

21 **MS. SMITH:** I'm slightly heartbroken about this  
22 whole -- the venomous snakes analogy does not make me feel good  
23 about this, but let me tell you what the venomous snake is here  
24 is 45 milliseconds. They don't allege that somebody said  
25 everything at that time, and I encourage people to look at the



## PROCEEDINGS

1 complaint, that someone said anything less than a hundred  
2 milliseconds is a defect. It was 45, 45, 45, 45. That's what  
3 the issue is, not something that's a hundred percent more than  
4 that.

5 **THE COURT:** Okay.

6 **MS. SMITH:** But I enjoy it, but I'm frightened by the  
7 analogy.

8 **THE COURT:** All of my analogies in hearings are poor,  
9 including that one.

10 Ms. Smith, your time's elapsed. Actually, it elapsed  
11 during my hypothetical, but I needed to hear the answer.

12 Mr. Tellis, what about this point? Let's keep that  
13 part of the conversation going. Ms. Smith' argument would be,  
14 look -- you know, the plaintiffs', essentially the argument's  
15 going to be the plaintiffs can't have it both ways. The Court  
16 wouldn't let you have a complaint where you alleged 45  
17 milliseconds, but you had a lot of inconsistent other  
18 allegations in the complaint. You -- maybe you read the  
19 Court's invitation correctly and you accepted a hundred  
20 milliseconds, but there's not an allegation that says there was  
21 corporate knowledge of a hundred milliseconds. There's only  
22 corporate knowledge at the level where your complaint was  
23 dismissed.

24 Ms. Smith, how did I do summarizing your argument?

25 **MS. SMITH:** I thought you did it beautifully, Your

## PROCEEDINGS

1 Honor.

2 **THE COURT:** So Mr. Tellis, Ms. Smith likes my  
3 restatement. What's the response to that?

4 **MR. TELLIS:** The response is in 1999, Chris Caruso,  
5 on the Delco team, warned the trucks group that the threshold  
6 they were playing with was dangerous. When we say the cars  
7 groups heeded his advice and implemented the hundred-  
8 millisecond cutoff, it's fair to infer from that that they  
9 understood that a hundred-millisecond cutoff was appropriate.  
10 They intentionally chose to ignore it and implement something  
11 less than.

12 This isn't arbitrary. The car group got the hundred  
13 milliseconds from somewhere and implemented it.

14 **THE COURT:** If I go back -- so this is how all of us  
15 make our money. Especially you; I just decide.

16 But this is really -- you know, we're really sort of  
17 dancing on the head of a pin here. I'd have to get the second  
18 amended complaint which I don't have in my binder. The  
19 question is what -- what was communicated. So if the company  
20 says ...

21 I don't want to use so much time. Let me see if I  
22 can cut to the chase.

23 So I hear your argument as GM adopts -- GM adopts a  
24 hundred milliseconds for cars. Then GM adopts 45 milliseconds  
25 for trucks. Then Chris Caruso or people on that team say to

**PROCEEDINGS**

1 GM, that's too low, and we know that because that's -- let's  
2 just say that's too low. And you're asking the Court -- and  
3 that's -- those are the -- that's what the body of pleadings  
4 would establish as the history, and you're asking the Court to  
5 say, look, you have to read these allegations in the light most  
6 favorable to plaintiffs. We know what GM thought was a safe  
7 cutoff because they adopted that for cars, and the fact that  
8 they were told it's too low at 45 does not mean that 46 was  
9 safe. You can't read the complaint that way.

10 **MR. TELLIS:** That's correct.

11 And the other points that we made, which were that  
12 there's data out there about how long it takes for an accident  
13 to play out, what the other groups are doing, you know, what  
14 the other competitors are doing, but the way I see it is we're  
15 required to allege knowledge of a defect. We define the defect  
16 as a cutoff of less than a hundred milliseconds. They clearly  
17 know that these trucks have a cutoff of less than a hundred  
18 milliseconds. I feel like we've done what we need --

19 **THE COURT:** I know that, but the question is not do  
20 they know what their own cutoff is; of course they do. The  
21 question is do they know that it's unsafe. Right? Would you  
22 agree with my characterization of what's at issue?

23 **MR. TELLIS:** Yes.

24 **THE COURT:** Okay.

25 **MR. TELLIS:** Except we've established the fact that a

## PROCEEDINGS

1 cutoff of less than a hundred milliseconds is unsafe through  
2 countless allegations in this complaint. I've gone through  
3 them.

4 **THE COURT:** You keep saying that. I'll keep telling  
5 you that's not what we're talking about right now.

6 **MR. TELLIS:** Okay.

7 **THE COURT:** We're talking about corporate knowledge  
8 of the fact that that cutoff was unsafe.

9 **MR. TELLIS:** Oh. Well, but the reason Chris Caruso  
10 told them not to adopt what they were doing was because it was  
11 reckless and dangerous.

12 **THE COURT:** Does Chris Caruso carry all this weight  
13 for you?

14 **MR. TELLIS:** Well, Chris Caruso had firsthand  
15 knowledge, and he's been an expert --

16 **THE COURT:** Mr. Tellis, let me just say to everybody,  
17 please answer the Judge's question. I'm only saying it to you,  
18 Mr. Tellis, but I could have said it to everybody earlier. So  
19 I'm going to try again.

20 **MR. TELLIS:** Well, I guess I --

21 **THE COURT:** No, when I say I'm going to try again  
22 means I'm about to talk, so don't talk when I'm talking.

23 **MR. TELLIS:** Sorry.

24 **THE COURT:** I could feel -- and maybe I better  
25 actually stop there, because I can hear the impatience in my

**PROCEEDINGS**

own voice of Mr. Tellis, and that's probably a sign I'm not doing my best work.

So everyone's time has elapsed.

**MR. TELLIS:** My only problem is I struggled when you said "carry all the weight." He's certainly an important component of our case. I'm sure we will have corroborating testimony from others, but I was caught off --

**THE COURT:** Not at the 12(b)(6) stage you wouldn't.

**MR. TELLIS:** Fair enough.

**THE COURT:** Yeah. Once again I would say, please keep my actual question in mind.

Folks, I'm going to take your motion under submission.

**VOICES:** Thank you, Your Honor.

(Proceedings concluded at 3:02 p.m.)

---o0o---

**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Friday, February 21, 2025



Stephen W. Franklin, RMR, CRR, CPE  
Official Reporter, U.S. District Court